



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

913 SECOND APPEAL NO. 409 OF 2024

Gopal Bhagwan Sonar

....Appellant

VERSUS

Chandrashekhar Devidas Ahirrao

.....Respondent

.....

Mr. V. B. Patil, Advocate for Appellant.

Mr. A. N. Sabnis, Advocate for the Respondent.

CORAM : R. M. JOSHI, J.

DATE : 5th FEBRUARY, 2025.

PER COURT :

1. This appeal under Section 100 of the Code of Civil Procedure takes exception to the findings of fact recorded by the Trial Court which are confirmed by the First Appellate Court.

2. Facts as they appear from record which led to filing of this appeal can be narrated in brief as under :-

Plaintiff filed a suit against Defendant for specific performance of contract. He has relied upon agreement to sale dated 01.04.2008 executed by Defendant in respect of the suit property. It is the case of Plaintiff that total consideration of Rs. 11,00,000/- was

fixed out of which amount of Rs. 9,00,000/- was paid on 01.04.2008 by way of earnest money. It is further pleaded that parties agreed that part payment of Rs. 1,00,000/- be paid on or before 05.07.2008 and remaining amount to be paid on or before 10.08.2008. It is claimed by plaintiff that on 03.07.2008 he paid amount of Rs.1,25,000/- to defendant and defendant executed additional payment receipt in presence of the witness. There are averments with regard to publication of notice in the newspaper on 11.07.2008 as plaintiff found that defendant was intending to enter into the transaction in respect of the said property with third party. It is specifically pleaded in the plaint that plaintiff is ready and willing to perform his part of contract. On these amongst other submissions, decree of specific performance is sought.

3. Defendant filed written statement denying the transaction. It is specifically averred that at gun point certain signatures were obtained from defendant. He also claimed that offence came to be registered against the plaintiff with Parola police station. With these assertions dismissal of suit was solicited.

4. Before learned Trial Court, parties led evidence. Trial Court decreed the suit and directed specific performance as asked by the plaintiff. The First Appellate Court confirmed the said order. Hence this appeal.

5. Learned counsel for appellant submits that substantial question of law is involved in this appeal in view of the fact that defendant had denied in his written statement the execution of document i.e. agreement to sale and the receipt issued subsequently. In this regard, there is finding recorded by the Trial Court to the effect that plaintiff has proved execution of document by defendant so also payment of consideration of Rs. 1,25,000/- in presence of witness. Thus, initial burden on the plaintiff stood discharged. On the other hand, it is the case of the defendant that the said signatures were obtained on gun point by the plaintiff. No doubt, a report was lodged with concerned police station. However, admittedly, the same has resulted in filing of 'B' summary. There is no dispute about the fact that the defendant has not challenged said B summary. It is therefore clear that the said report was false and hence could not become a ground to discard case of plaintiff.

6. Learned counsel for appellant has placed reliance on judgment of this Court in case of Radhabai Khanduji Suryawanshi vs. Rajendra Vinayakrao Dhule, **2007(4) Bom.C.R. 867**. Reference is made to paragraph No. 13 of the said judgment which is reproduced thus :-

“13. To consider the submissions made on behalf of the parties, it is necessary to consider the document Exh. 22 which is an agreement of sale dated 30.07.2002. The document appears to be a notarised document. There is much force in the submission of the Counsel for the appellant that the document is not signed by the parties before the notary. On a perusal of the document, it is apparent that the notarisation of the document is not in the proper form. The parties are not identified by a Counsel or an Advocate. There is no mention in the document that the Counsel has identified/solemnly affirmed that the parties signing the document are personally known to him. In fact, no advocate has signed the document Exh. 22. It is also conspicuous to note that though it is stated by the Notary that his term expires on 25.1.2006, the registration number of the Notary is not stated either on the seal or on any other part of the document. The registration number of a notarised document also normally appears on the document but, the serial number of this notarised document, i.e. Exh. 22, is

also not mentioned on the document. Further the attesting witness Suryabhan Bagde did not depose in his examination-in-chief that the document was signed by the parties before the Notary. It is known to one and all that the document which is signed earlier cannot be notarised at a subsequent point of time. The parties have to sign the document before the Notary Public. Not only this, but the plaintiffs evidence is also conspicuously silent on this point. Though the attesting witness and the plaintiff have stated that the document was signed by the plaintiff on 30.7.2002 and the defendant had endorsed her thumb impression on the said document, but the witnesses for the plaintiff have not deposed that the thumb impression of the defendant and the signature of the plaintiff was obtained before the Notary and the document was executed before the Notary. It is also worth noting that though the plaintiff admitted in his cross-examination that the defendant could sign, the document Exh. 2 does not bear the signature of the defendant and bears her thumb impression only. Thus, it is highly unlikely that the document was executed before the Notary though the document is shown to have been notarised. The absence of the identification or solemn affirmation by an advocate that he knows and identifies the party would clearly show that the document has been notarised without following the proper procedure for notarisation thereof. It is not possible to hold that a

document would be notarised without the identification of the parties who have executed the same. Moreover, there is no whisper in the oral evidence of the plaintiff and the attesting witness Shri Suraybhan Bagde that the document was indeed executed before the Notary on 30.7.2002. The aforesaid facts lead to the only conclusion that the document was not signed by the parties before the Notary and it appears that the thumb impression of the defendant existed on the document on the day it was brought to the Notary for notarisation. The plaintiff has definitely not approached the Court with clean hands.

Relying upon the observations made by this Court in the said judgment, it is sought to be contended that this judgment squarely applies to the present case. It is his grievance that the Appellate Court has failed to take into consideration said judgment.

7. On this issue, reference can be made to the judgment of First Appellate Court more particularly paragraph No. 24. As rightly observed by learned First Appellate Court that the facts as they appear in the judgment in case of Radhabai (supra) and the instant case materially differ. It is pertinent to note that the judgment in case of Radhabai (supra) was passed by this Court in first appeal

wherein it was permissible for this Court to re-appreciate the evidence and record independent finding of fact. In exercise of powers under Section 100 of the Code of Civil Procedure, there cannot be reappreciation of evidence to record fact finding afresh. What is to be seen is whether there is perversity in the findings recorded by the Courts below. Having regard to the facts of the case, it cannot be said that the findings recorded by the First Appellate Court are perverse, it being in consonance with evidence on record.

8. It is also sought to be argued by learned counsel for the appellant that the plaintiff has failed to plead and prove readiness and willingness. To support this submission, he has placed reliance on judgment of Hon'ble Supreme Court in case of P. Meenakshisundaram vs. P. Vijayakumar and another, **2018 DGLS(SC) 207**. There cannot be any dispute with regard to the proposition of law sought to be canvassed by learned counsel for the appellant that in order to get a decree of specific performance, plaintiff must plead and prove his readiness and willingness. Needless to say that such readiness and willingness needs to be shown during the entire proceeding.

9. Now question arises as to whether in this case plaintiff has failed to plead and prove the same. Undisputedly, there is a pleading in the plaint that plaintiff is ready and willing to perform his part of the contract. Plaintiff led evidence to indicate that sum of Rs. 9,00,000/- was paid by way of earnest money and amount of Rs. 1,25,000/- was paid as second installment. He has also shown that total consideration is Rs. 11,00,000/-. Thus, anything hardly remained for the plaintiff to perform in order to prove his readiness and willingness. In any case, pleadings of plaintiff and evidence on record are sufficient to discharge the said burden on plaintiff.

10. This Court, therefore, finds no substantial question of law being involved in this appeal. As a result of above discussion, appeal stands dismissed.

11. Pending application if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge